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7                   UNITED STATES DISTRICT COURT  
8                   WESTERN DISTRICT OF WASHINGTON  
9                   AT TACOMA

10                 CATHERINE P. DUDYS and C.D., a minor,

11                 v.  
12                 Plaintiffs,

13                 Case No. 08-5187RJB

14                 UNITED STATES OF AMERICA,  
15                 Defendant.

16                 ORDER GRANTING  
17                 PLAINTIFFS' MOTION FOR  
18                 SUMMARY JUDGMENT ON  
19                 FAILURE TO MITIGATE  
20                 AFFIRMATIVE DEFENSE

21                 This matter comes before the Court on Plaintiffs' Motion for Summary Judgment on  
22                 Failure to Mitigate Affirmative Defense (Dkt. 33). The Court has considered the relevant  
23                 documents and the remainder of the file herein.

24                  **I. FACTUAL AND PROCEDURAL HISTORY**

25                 On March 28, 2008, Plaintiffs filed a complaint alleging negligence by the Defendant that  
26                  caused injuries to C.D. and loss of consortium to Catherine Dudys. Dkt. 1. On June 2, 2008, the  
27                  Defendant answered the complaint and asserted three affirmative defenses. Dkt. 11. Among the  
28                  affirmative defenses was the allegation that Plaintiff Catherine Dudys or those adults acting on  
29                  Plaintiff C.D.'s behalf failed to mitigate damages. *Id.* On January 22, 2009, Plaintiffs brought this  
30                  current motion for summary judgment on the Defendant's affirmative defense that Plaintiffs failed  
31                  to mitigate damages. Dkt. 33.

1 C.D. was born at the Bremerton Naval Hospital on January 15, 2004. Dkt. 33 at 2.  
2 During the birth, personnel at the Bremerton Naval Hospital made multiple attempts at vacuum  
3 extraction followed by multiple attempts at forceps birth. *Id.* In making these attempts,  
4 defendant's personnel fractured C.D.'s skull. *Id.* As a consequence of the birth trauma, C.D.  
5 suffered a stroke and has been left with multiple severe physical and mental impairments,  
6 including right hemiparesis and cognitive deficits. *Id.* C.D. is Catherine Dudys first child. *Id.*

7 **II. DISCUSSION**

8 Summary judgment is proper only if the pleadings, the discovery and disclosure materials  
9 on file, and any affidavits show that there is no genuine issue as to any material fact and that the  
10 movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is  
11 entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient  
12 showing on an essential element of a claim in the case on which the nonmoving party has the  
13 burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 312 (1985). There is no genuine issue  
14 of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find  
15 for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586  
16 (1986) (nonmoving party must present specific, significant probative evidence, not simply "some  
17 metaphysical doubt"). *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a  
18 material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring  
19 a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477  
20 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc., v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630  
21 (9th Cir. 1987).

22 The determination of the existence of a material fact is often a close question. The Court  
23 must consider the substantive evidentiary burden that the nonmoving party must meet at trial -  
24 e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254; *T.W. Elec.*  
25 *Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual issues of controversy in favor of  
26 the nonmoving party only when the facts specifically attested by that party contradict facts  
27 specifically attested by the moving party. The nonmoving party may not merely state that it will

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1 discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial  
2 to support the claim. *T.W. Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*).  
3 Conclusory, nonspecific statements in affidavits are not sufficient, and missing facts will not be  
4 presumed. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990). The burden on the  
5 moving party may be discharged by showing that there is an absence of evidence to support the  
6 nonmoving party's case. *Celotex Corp.*, 477 U.S. 317, 325 (1986).

7 Plaintiffs argue in their motion for summary judgment that the Defendant has the burden  
8 of proof in showing that the Plaintiffs failed to mitigate damages, and that the Defendant has not  
9 provided any evidence to meet their burden. Defendant filed a response to Plaintiffs' motion for  
10 summary judgment that does not oppose Plaintiffs' motion. Defendant states that in light of  
11 Plaintiffs' responses to the United States' discovery on the issue, the Defendant will no longer  
12 assert the affirmative defense of failure to mitigate. Plaintiffs' motion for summary judgment  
13 should be granted because there is no longer a genuine issue of material fact as to the  
14 Defendant's affirmative defense that Plaintiffs failed to mitigate damages.

15 **III. ORDER**

16 Therefore, it is hereby, ORDERED that:

17 Plaintiffs' Motion for Summary Judgment on Failure to Mitigate Affirmative Defense  
18 (Dkt. 33) is **GRANTED**; and

19 The Clerk is directed to send uncertified copies of this Order to all counsel of record and  
20 to any party appearing *pro se* at said party's last known address.

21 DATED this 9<sup>th</sup> day of February, 2009.

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23 ROBERT J. BRYAN  
24 United States District Judge

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